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February 27, 2012

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Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

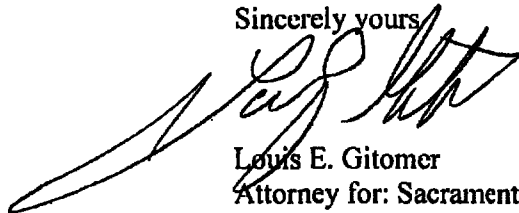
RE: Docket No. 42133, *Sierra Railroad Company and Sierra Northern  
Railway v. Sacramento Valley Railroad Company, LLC, McClellan  
Business Park, LLC, and County of Sacramento*

Dear Ms. Brown:

Enclosed for efilng is the Reply to the Reply filed by Sierra Railroad Company  
and Sierra Northern Railway to the Motion for Protective Order filed by Sacramento  
Valley Railroad Company, LLC, McClellan Business Park, LLC, and County of  
Sacramento.

Thank you for your assistance. If you have any questions, please call or email  
me.

Sincerely yours



Louis E. Gitomer  
Attorney for: Sacramento Valley Railroad  
Company, LLC, McClellan Business Park, LLC,  
and County of Sacramento

Enclosure

ENTERED  
Office of Proceedings

FEB 27 2012

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. 42133

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SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY

v.

SACRAMENTO VALLEY RAILROAD COMPANY, LLC  
MCCLELLAN BUSINESS PARK, LLC  
AND COUNTY OF SACRAMENTO

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RESPONSE OF SACRAMENTO VALLEY RAILROAD COMPANY, LLC,  
MCCLELLAN BUSINESS PARK, LLC, AND COUNTY OF SACRAMENTO TO  
REPLY OF SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY  
AND REQUEST FOR LEAVE TO FILE A REPLY-TO-REPLY

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Company, LLC, McClellan Business Park,  
LLC, and County of Sacramento

Dated: February 27, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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RESPONSE OF SACRAMENTO VALLEY RAILROAD COMPANY, LLC,  
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Sacramento Valley Railroad Company, LLC (“SAV”), McClellan Business Park, LLC (McClellan”), and the County of Sacramento (“Sacramento” and with SAV and McClellan, jointly referred to as “Defendants”), respond to the reply filed by Sierra Railroad Company (“Sierra”) and Sierra Northern Railway (“SERA”), collectively “Complainants” on February 23, 2012 (the “Reply”), to the Motion for Protective Order (the “Motion”) filed by Defendants on February 16, 2012.

Defendants request that the Surface Transportation Board (the “Board”) grant the Defendants leave to file this reply to the Reply. The Board’s rules prohibit replies to replies. 49 C.F.R. §1104.13(c). However, the Board may waive this rule for good cause shown. *See Tongue River Railroad Company, Inc.-Construction and Operation-Western Alignment*, STB FD 30186 (Sub-No. 3) slip op. at 4 (STB served June 15, 2011); *CSX Corp.-Control-Chessie System et al.*, 2 S.T.B. 554, 556 (1997). Typically in Board proceedings, a Motion for Protective Order

is not opposed nor is a significant modification requested. Complainants propose a modification to the proposed protective order that will undermine the purpose of the protective order and create precedent for a party to obtain proprietary information that it could not normally obtain. Defendants contend that good cause exists for the Board to permit them to file this reply-to-reply.

Defendants filed the Motion in order to protect any appropriately designated material produced in discovery from improper use or disclosure. Use is to be limited to this proceeding and any judicial review and disclosure is to be limited to people who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceedings arising therefrom. See Appendix to Motion section I(a) and (b), respectively. The Board typically adopts similar language in the protective orders it enters. See, *Cedar River Railroad Company—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company*, STB FD 35593, slip op. at 3 (STB served February 24, 2012).

In the Reply, Complainants ask the Board to modify the proposed protective order to expand the use of CONFIDENTIAL and HIGHLY CONFIDENTIAL information beyond the instant proceeding and beyond people directly involved in the instant proceeding. Indeed, publically Complainants ask the Board to make CONFIDENTIAL and HIGHLY CONFIDENTIAL information available to an unidentified party. In addition, Complainants allege, without any proof that “Sierra’s due diligence disclosure in connection with its potential acquisition by \_\_\_\_\_ requires that all litigation documents be made available to it.” Reply at the second unnumbered page of the pleading. Finally, Complainants contend that a similar exception to a protective order was entered in unrelated U.S. District Court litigation where the Complainants are defendants, but the Defendants are not even parties (a baseless argument).

Granting the Reply will facilitate the use of commercially sensitive material for purposes beyond this proceeding and by people who are not parties to this proceeding. Defendants filed the Motion to facilitate discovery in conformity with Board precedent. “Finally, we will grant Dairyland’s motion for a protective order to **facilitate discovery**. The motion conforms with the Board’s rules at 49 CFR 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. **Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes.**” *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105, slip op. at 7 (STB served July 29, 2008) (emphasis added). Complainants are seeking to modify the protective order proposed by Defendants to use “confidential information” “for other purposes” contrary to longstanding Board precedent.

Opposition to a protective order is unusual.

In considering opposition to a protective order or a request to make public information that has been filed under seal, the Board focuses on whether declassification would assist the party in making its case. *The Central Illinois Railroad Company—Lease and Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL*, STB Finance Docket No. 33960 (STB served Mar. 2, 2001). In close cases, we will protect confidentiality unless the opposing party can show that the lifting of confidentiality is necessary for to make its case, argue an appeal adequately, or satisfy a statutory goal. *Id.*

*Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—in Coos, Douglas, and Lane Counties, OR*, STB Docket No. AB-515 (Sub-No. 2) slip op. at 1-2 (STB served August 1, 2008). Complainants do not address or meet any of the three criteria enumerated by the Board. Complainants do not intend to provide the information because it is necessary to make their case. Instead, Complainants contend that they must provide this information because they say so.

Granting the Reply will facilitate the use of commercially sensitive material for purposes beyond this proceeding and by people who are not parties to this proceeding. Defendants filed the Motion to facilitate discovery in conformity with Board precedent. “Finally, we will grant Dairyland’s motion for a protective order to **facilitate discovery**. The motion conforms with the Board’s rules at 49 CFR 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. **Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes.**” *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105, slip op. at 7 (STB served July 29, 2008) (emphasis added). Complainants are seeking to modify the protective order proposed by Defendants to use “confidential information” “for other purposes” contrary to longstanding Board precedent.

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Defendants urge the Board not to create precedent in this proceeding that will open the door in the future to abuse of its protective order processes. In this proceeding, Complainants filed a complaint against Defendants. On the record before the Board, it is unknown whether the negotiations for the sale of Sierra commenced before or after the Complaint was filed.<sup>1</sup>

As requested by Complainants, CONFIDENTIAL and HIGHLY CONFIDENTIAL material produced by Defendants will be used for a purpose other than this proceeding, contrary to past Board precedent. Indeed, Complainants are asking the Board to save them from themselves. Complainants did not have to agree to provide CONFIDENTIAL and HIGHLY CONFIDENTIAL material produced by third parties in litigation as part of their due diligence. Moreover, Complainants did not have to file the Complaint while negotiations were proceeding. Instead, Complainants have decided that there is no risk to themselves to be able to provide CONFIDENTIAL and HIGHLY CONFIDENTIAL material from Defendants to an unidentified third party that is most likely not a railroad subject to the jurisdiction of the Board (and therefore generally not subject to sanctions from the Board). Although Defendants do not necessarily ascribe such motives to Complainants, Defendants can foresee a scenario where a party wants to see certain agreements between a railroad and a third party and convinces a potential target to file suit, obtain the information in discovery, and then have to provide through due diligence.

In addition to the CONFIDENTIAL and HIGHLY CONFIDENTIAL material being used for purposes beyond this proceeding, it will be made available to people not involved in this

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<sup>1</sup> Indeed, it is not known whether negotiations are ongoing or have terminated or even existed due to the paucity of evidence provided by Complainants. Were the Board to grant the relief requested in the Reply, which Defendants contend is not necessary much less justified, Defendants contend that the Board should, at a minimum require the party negotiating with Sierra to file an affidavit confirming the existence of negotiations. The Board should also confirm that there is a due diligence agreement requiring production of documents produced in discovery.

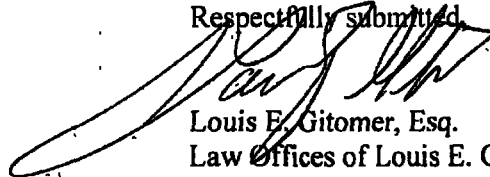
proceeding contrary to the Board's standard protective order. Defendants make clear their contempt for the Board's general protective order when on the third unnumbered page of the Reply, Defendants indicate that "Documents designated as HIGHLY CONFIDENTIAL can be reviewed by \_\_\_\_\_ at the offices of Sierra Railroad Company." Under paragraph 2 of the proposed protective order, Defendants propose that HIGHLY CONFIDENTIAL material only be made available to "outside counsel or outside consultants" in conformance with typical Board protective orders. *See, e.g., Dakota, Minnesota & Eastern Railroad Corporation—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company*, STB FD 35589, slip op. at 4 (STB served February 3, 2012). Defendants question how Sierra can receive HIGHLY CONFIDENTIAL information in accord with a protective order; much less make it available to a third party? The answer is that they cannot.

Defendants respectfully request the Board to deny the modification to the proposed protective order sought by Complainants. Defendants contend that the Board should not open the door to questions concerning the efficacy of its long standing protective order process.



For the reasons set forth above, Defendants respectfully request that the Board grant the Motion and adopting the protective order as requested by Defendants.

Respectfully submitted,



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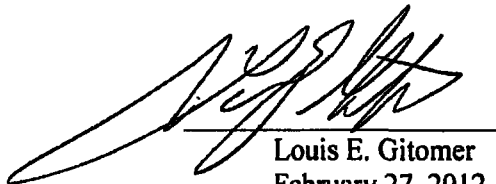
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Dated: February 27, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing document was served  
electronically on

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Attorney for Sierra Railroad Company and Sierra Northern Railway



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February 27, 2012